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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)	ET Dkt. No. 97-99

JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION, PARTIAL RECONSIDERATION, AND CLARIFICATION

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Dated: July 8, 1997

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JOINT OPPOSITION TO PETITIONS FOR RECONSIDERATION, PARTIAL RECONSIDERATION, AND CLARIFICATION

Digital Services Corporation ("DSC"), Microwave Services, Inc. ("MSI") and Teligent, L.L.C. ("Teligent," formerly Associated Communications, L.L.C.) (collectively, the "DEMS Licensees"),[1] by their attorneys, jointly request that the Commission deny the Petitions for Reconsideration, Partial Reconsideration, and Clarification filed in the above-captioned proceeding.[2] The Petitioners raise no arguments that warrant reconsideration of the Commission's order relocating the Digital Electronic Message Service ("DEMS") to the 24 GHz band. Rather, they reflect thinly veiled attempts to impede competition in the local telecommunications market and to appropriate for their own use portions of the 24 GHz band.

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1 For purposes hereof, all references to the entity formerly known as "Associated Communications" will be to "Teligent."

2 WebCel Communications, Inc. ("WebCel"), DIRECTV Enterprises, Inc. ("DIRECTV") and BellSouth Corporation ("BellSouth") filed Petitions for Reconsideration; Millimeter Wave Carrier Association, Inc. ("MWCA") filed a Petition for Partial Reconsideration; and WinStar Communications, Inc. ("WinStar") filed a Petition for Clarification.

Introduction and Summary

The *DEMS Relocation Order*[3] is a reasoned solution to a difficult problem -- it protects the government's current and future military space station operations in the 18 GHz band against harmful interference from DEMS operations while ensuring the continued operation of *licensed and constructed* DEMS systems on a nationwide basis. The Commission effected the relocation without public notice and comment because, according to the National Telecommunications and Information Administration ("NTIA"), acting on behalf of the Department of Defense, the expedited DEMS relocation was "essential to fulfill requirements for Government space systems to perform satisfactorily."[4] No one, including the DEMS licensees and the Petitioners, is qualified to second-guess NTIA's (or the Defense Department's) determination.

In light of NTIA's national security considerations, and consistent with the Administrative Procedure Act ("APA") and longstanding Commission precedent in similar mandatory relocation proceedings, the Commission correctly dispensed with public notice and comment and provided incumbent DEMS licensees and applicants with comparable replacement spectrum in the 24.25-24.45 GHz and 25.05-25.25 GHz bands ("24 GHz band"). In complying with NTIA's request, the Commission reasonably sought to ensure that, based on the coverage, capacity and operations of DEMS systems at 24 GHz as compared to 18 GHz,

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3 *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, Order*, 12 FCC Rcd 3471 (1997) (*"DEMS Relocation Order"*).

4 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997 at 1 (*"January 7, 1997 NTIA Letter"*).

"incumbent DEMS operators are able to provide service using frequencies in the 24 GHz band in a manner equivalent to their operations in the 18 GHz band."[5]

None of the Petitioners dispute that the Commission properly invoked the national security exception or contend that it should have conducted a public notice and comment proceeding to examine NTIA's representation that DEMS relocation was a matter of national security. Rather, the Petitioners' principal argument is that the Commission was constrained to restrict the scope of its order so that it remedied only the Government's immediate national security concerns (*i.e.*, eliminating interference to military earth stations in Washington, D.C. and Denver, Colorado). This argument fundamentally mischaracterizes NTIA's national security demand and disregards equally compelling Commission public interest considerations. Although NTIA referenced Government earth stations only in Washington and Denver, it specified that band-sharing between DEMS and the Government's military satellite systems "will not be possible" within 40 km of any government earth stations, regardless of geographical location.[6] Indeed, in a subsequent letter, NTIA confirmed that "both existing *and anticipated* FCC licensees could cause interference problems to the Federal Government use of the [18 GHz] band."[7] Thus, it was entirely rational for the Commission to relocate DEMS nationally given the likelihood that the Government may have current or future military earth stations, some of which may be mobile, in other parts of the country. In contrast, the Petitioners would force the Commission to relocate DEMS

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5 *DEMS Relocation Order* at 3476.

6 *See January 7, 1997 NTIA Letter* at 2.

7 Letter from Richard Parlow, NTIA, to Richard Smith, FCC, dated March 5, 1997, at 1 ("*March 5, 1997 NTIA Letter*") (emphasis added).

licensees on an "as needed," piecemeal basis, thereby compromising national security by signalling the location of each newly installed secret military facility. Such an approach also would create a disruptive, ever-changing patchwork of DEMS band allocations that would disserve the public interest.

Because the Petitioners hold no authorizations in either the 18 GHz or 24 GHz bands, they have in no way been harmed by -- and thus have no standing to dispute -- the DEMS relocation.[8] Rather, Petitioners are merely attempting to impede the deployment of the DEMS Licensees' facilities-based systems for anti-competitive purposes or to appropriate portions of the 24 GHz DEMS band for their own use.[9] Petitioners contend that the Commission should have evicted DEMS licensees from the 18 GHz band on a piecemeal basis without immediately providing replacement spectrum. Had the Commission done so, it could have jeopardized the Government's military satellite operations in the 18 GHz band

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[8] Although WinStar claims that it *may* have acquired an 18 GHz DEMS license and that it is still conducting an internal audit to determine the status of such license (nearly three months after the *DEMS Relocation Order* was released), according to the Commission's records and Consumer Assistance Branch the company acquired only 10 GHz DEMS licenses. WinStar's claim is a pretext to create the impression that it has more than a mere inchoate interest in the DEMS relocation.

[9] For its part, MWCA fails to identify its members or their interest in the DEMS relocation. Accordingly, its Petition should be dismissed. *See U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (finding that proceedings in which certain parties are anonymous "would . . . seriously implicate due process); *see also Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) (parties must openly identify themselves in order to "protect[] the public's legitimate interest in knowing all the facts involved, including the identities of the parties"). As of July 7, 1997, long after the *DEMS Relocation Order* was released and MWCA filed its petition, the DEMS Licensees were unable to obtain any information regarding MWCA's existence or membership from Washington, D.C. area directory assistance, the Encyclopedia of Associations, the Internet, or LEXIS/NEXIS.

and would have hurt consumers by inhibiting the expansion of competition in the local telephone market contrary to the express provisions of the Telecommunications Act of 1996 ("1996 Act").[10]

I. Background

At the time of the *DEMS Relocation Order*, the DEMS Licensees collectively held licenses to construct and operate DEMS systems in the 18.87-18.92 GHz and 19.21-19.26 GHz frequency bands ("18 GHz band") in approximately 31 markets.[11] Specifically, pursuant to applications that appeared on Public Notice between October and December 1993, DSC held DEMS licenses for 26 Standard Metropolitan Statistical Areas ("SMSAs"). Similarly, pursuant to applications that appeared on Public Notice between December 1993 and August 1995, MSI separately held DEMS licenses for 30 SMSAs. The Commission granted all of DSC's and MSI's applications for their current licenses between January 1995 and February 1996. In response to an express request by MSI, the Commission granted MSI waivers to construct and operate multiple DEMS channel systems in 25 of its 27 SMSAs.[12]

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10 Indeed, members of Congress recently have expressed frustration that there are "still too many economic and regulatory barriers to new competitors" who want to offer local telecommunications services. *See, e.g.*, "Kerrey Says Telecommunications Act Falls Short," *Omaha World-Herald* (May 29, 1997).

11 All of these licenses have been modified to provide for DEMS operations in the 24 GHz band in addition to or in lieu of the 18 GHz band. *See Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz band to the 24 GHz band and to Allocate the 24 GHz band for Fixed Service, Order,* DA 97-1285 (rel. June 24, 1997) (*"DEMS Modification Order"*).

12 *See, e.g.*, MSI Application for Pittsburgh SMSA, Exhibit E at 13 (filed Aug. 9, 1995). The Commission's rules generally limit applicants to a single DEMS channel in a market. *See* 47 C.F.R. § 21.502(b), now codified as § 101.505(b). Although (continued...)

Throughout 1995 and the first half of 1996, MSI and DSC -- first independently and later in a cooperative effort -- proceeded to develop and construct their respective licensed facilities. The companies entered into the Teligent joint venture to manage the deployment and operation of their DEMS systems and to take advantage of technological developments on a more efficient basis.[13] By July 1996, MSI and DSC collectively completed the initial construction of DEMS systems in 27 SMSAs and commenced commercial service. Contrary to the Petitioners' unsupported allegations, the Commission recently confirmed, after thorough investigation, that MSI and DSC timely constructed their DEMS systems and commenced service to customers in accordance with the Commission's rules.[14]

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[12](...continued)
WebCel claims that there are "no reported FCC decisions waiving or modifying the single channel" rule, *see* WebCel Petition at 5, the Commission granted such waivers to other applicants, including Centel Corporation, FCC File Nos. 2-CE-P-92 through 21-CE-P-92 (July 8, 1992) and FirstMark Communications, Inc., FCC File Nos. 9304624 (Jan. 18, 1995) and 9304620 (Feb. 1, 1995). Interestingly, the same counsel that filed and prosecuted Centel's applications is now representing MWCA in challenging the validity of DEMS multiple channel waivers. *See* MWCA Petition at 17.

[13] Teligent, which is jointly owned by MSI and DSC, does not hold any DEMS licenses, although it does have pending applications for new DEMS licenses. WebCel's misleading assertion that Teligent controls DEMS licenses in 36 markets, *see* WebCel Petition at 2 n.3, ignores the fact that any transfer of MSI's and DSC's licenses to Teligent can take place only after requisite Commission approval is obtained.

[14] *See* Letter from Howard C. Davenport, Chief of the Enforcement Division of the Wireless Telecommunications Bureau, to Jay L. Birnbaum, Counsel for MSI, dated April 2, 1997 and Letter from Howard C. Davenport to Hal B. Perkins, Counsel for DSC, dated April 8, 1997. Despite the fact that the DEMS Licensees provided WebCel with copies of Commission correspondence that confirms their timely construction and operation of DEMS systems, WebCel persists in alleging that the DEMS Licensees failed to meet their build-out requirements. WebCel Petition at 6-7. WebCel's patently false allegations that the DEMS Licensees failed adequately to construct their systems constitute material misrepresentations to the Commission and reflect the extremes to which WebCel will go to impede competition.

During this time, MSI and DSC were continuing to construct their systems and were working closely with equipment manufacturers to develop highly efficient point-to-multipoint equipment for the 18 GHz band. This equipment, which required significant investment, research and development, was on the verge of deployment when Teledesic Corporation ("Teledesic") filed a request for a freeze on all DEMS licensing activity alleging that DEMS operations were *per se* incompatible with its proposed satellite system.[15] The Commission implemented a freeze on applications for new DEMS licenses on August 30, 1996.[16] The dispute with Teledesic regarding shared use of the 18 GHz band and the Commission's freeze on new DEMS licenses caused a substantial delay in the deployment of point-to-multipoint DEMS systems, which in turn deprived consumers of competitive choices for local service.[17]

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15 *See* Letter dated August 23, 1996 from Scott Blake Harris, Counsel for Teledesic, to Michele Farquhar, Chief, Wireless Telecommunications Bureau. The basis for Teledesic's request was the allegedly large number of applications proposing DEMS systems. Teledesic, however, was incorrect. The referenced pending DEMS applications were not for new licenses, but for additional nodal stations to continue the build out of already licensed markets.

16 *See Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band, Order*, DA 96-1481 (rel. Aug. 30, 1996).

17 The DEMS Licensees consistently maintained -- and still do -- that the dispute with Teledesic did not require relocation because DEMS systems could coordinate with and share the 18 GHz band with Teledesic's proposed satellite system. In fact, Motorola recently filed an application for a competing satellite system in the 18 GHz band in which it states that, in cases where coordination with fixed service stations is not practical, it will utilize "shielding and other techniques" to facilitate sharing. *See* Application for Celestri Multimedia LEO System filed by Motorola Global Communications, Inc., File No. 79-SAT-P/LA-97(63) at 71 (filed June 13, 1997).

On January 7, 1997, however, the status of DEMS deployment was further complicated when NTIA sent a letter to the Commission on behalf of the Department of Defense raising concerns about potential harmful interference between point-to-multipoint systems and the Government's military space stations operating in the 18 GHz band. In order to protect the Government's space stations without adversely impacting DEMS, NTIA proposed that DEMS be relocated to the 24 GHz band, which was previously allocated in the U.S. exclusively for radionavigation service and used solely by the FAA. NTIA urged that the relocation "*be undertaken on an expedited basis*" since it involved "military functions, as well as specific sensitive national security interests of the United States."[18]

The *DEMS Relocation Order* accommodates the national security concerns of NTIA and the Department of Defense. Yet the order also recognizes that resolving NTIA's core national security request (*i.e.*, the relocation of full power 18 GHz DEMS) without taking any other action would have caused a costly and unfair disruption to licensed, operating DEMS systems beyond that which national security required and would have effectively halted the processing of pending DEMS applications.[19] The DEMS Licensees, having expended substantial time and financial resources developing 18 GHz point-to-multipoint equipment, are in the process of developing similar equipment for the 24 GHz band at substantial cost in reliance on the *DEMS Relocation Order* so as to minimize delay in the continuing expansion of service to new customers. These systems will provide a full array of broadband services to small and medium-sized businesses, hospitals, schools and

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18 *See January 7, 1997 NTIA Letter* at 2 (emphasis added).

19 *See DEMS Modification Order* at ¶¶ 2-3; *DEMS Relocation Order* at 3475-77.

possibly residential customers in direct competition with the Petitioners and other local exchange service providers. Thus, the recent modification of all existing full power DEMS licenses to operate at 24 GHz satisfies national security requirements and facilitates the continued market entry of DEMS licensees.[20]

II. The APA's National Security Exception Justifies The Commission's Relocation Of DEMS Without Public Notice And Comment

A. NTIA's National Security Directive Warrants Relocating DEMS to 24 GHz

The Commission's decision to relocate DEMS on an expedited basis from 18 GHz to 24 GHz falls squarely within the APA's "military function" exception (also known as the "national security" exception). Specifically, the APA's general requirement that administrative agencies provide the public with notice and an invitation to comment prior to promulgating any new substantive regulation is not applicable to the extent that there is involved "a military or foreign affairs function of the United States."[21] The APA's legislative history

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20 WebCel's claim that the 24 GHz band is not immediately available for DEMS operations in Washington, D.C. and Newark, New Jersey is wrong. WebCel Petition at 13. DEMS licensees must simply coordinate with existing Government operations in these areas. *DEMS Relocation Order* at 3477. In fact, the DEMS Licensees already have ceased 18 GHz operations and commenced 24 GHz operations in the Washington, D.C., Baltimore and Denver markets.

21 5 U.S.C. § 553(a) ("This section applies, accordingly to the provisions thereof, except to the extent that there is involved -- (1) a military or foreign affairs function of the United States . . . ."). The Commission's rules contain a military function exception patterned after this APA exception: "Rule changes (including adoption, amendment, or repeal of a rule or rules) relating to the following matters will ordinarily be adopted without prior notice: (1) Any military, naval, or foreign affairs function of the United States." 47 C.F.R. § 1.412(b).

confirms that Congress intended agencies to defer to those charged with protecting national security when determining whether to invoke this provision.[22]

Petitioners wrongfully contend that although NTIA's national security considerations can justify the relocation of DEMS from the 18 GHz band, such considerations cannot justify the Commission's decision to relocate the service to a replacement band.[23] This restrictive reading of the national security exception would render the Commission incapable of accommodating both national security and the public interest. If the Commission had opened a rulemaking proceeding separate from the eviction of DEMS from 18 GHz to determine the DEMS destination spectrum, it would have irreparably harmed DEMS licensees and DEMS consumers and therefore disserved the public interest. In effect, Petitioners' claim is a blatant attempt to place DEMS in limbo and to further impede DEMS licensees' efforts to offer local, facilities-based competition.

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22 *See* S. Rep. No. 1980, 79th Cong., 2d Sess. 22 (1946) ("Senate Report"). Contrary to the claims of several Petitioners, *see, e.g.*, MWCA Petition at 12; DIRECTV Petition at 6, NTIA requested that some existing DEMS operations be relocated immediately, which indicates that the threat to national security was imminent. *See DEMS Relocation Order* at 3475. In any event, neither the APA nor interpreting case law limits the application of the APA's national security exception to instances of emergency or imminent threat. Thus, Petitioners' contention that the January 1, 2001 deadline for completing relocation evinces a lack of urgency is irrelevant. Moreover, in *Bendix Aviation Corporation v. FCC*, the court recognized that the Commission can pace relocation to minimize disruption to the operations of incumbent licensees yet still be responsive to national security concerns. *Bendix Aviation Corporation v. FCC*, 272 F.2d 533, 541 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. United States,* 361 U.S. 965 (1960) ("*Bendix*").

23 *See, e.g.*, DIRECTV Petition at 18; BellSouth Petition at 7; MWCA Petition at 8. DIRECTV, for example, argues that after moving DEMS from the 18 GHz band, the Commission should have "initiated a rulemaking proceeding to determine the best new 'home' for DEMS." DIRECTV Petition at 19.

Further, such a process would violate the licensing standards prescribed in the Communications Act of 1934, as amended, which enable the Commission to revoke or suspend a license only upon licensee wrongdoing or misconduct.[24] There is no Commission precedent endorsing the revocation or suspension of a station license on any basis other than the licensee's intentional wrongdoing or non-compliance with applicable rules. No such grounds are present here. To the contrary, after an exhaustive and thorough inspection of licensed DEMS facilities the Commission concluded that the DEMS Licensees are operating in full compliance with applicable rules.[25]

B. Judicial Precedent Supports the FCC's Application of the National Security Exception

Petitioners all but ignore the only applicable national security precedent, notwithstanding that such precedent was cited by NTIA and the Commission. Despite Petitioners' assertions to the contrary, the Commission's actions in this proceeding are supported by *Bendix Aviation Corporation v. FCC,* the benchmark case involving the Commission's application of the national security exception. The Commission in *Bendix* had satisfied the national security interests of the military while responsibly and reasonably accommodating the interests of displaced licensees by relocating them to comparable

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24 *See* 47 U.S.C. § 303(m) (delineating the Commission's license suspension authority); 47 U.S.C. § 312 (delineating the Commission's license revocation authority); *see also In the Matter of Revocation of License of Bernard J. Winner, et al.*, 102 FCC 2d 102 (Rev. Bd. 1981) (refusing to "terminat[e] . . . licenses prior to their normal expiration, without any finding that they have been misused").

25 *See supra* note 14.

spectrum in the most nondisruptive manner possible. That is *exactly* what the Commission did here.[26]

In *Bendix*, the Commission reallocated the 420-450 MHz and 8500-9000 MHz bands for exclusive government use at the request of the Office of Defense Mobilization which, like NTIA in the instant case, was acting on behalf of the Department of Defense. As here, the evacuation of the 8500-9000 MHz band in *Bendix* would have displaced fully authorized and operating licensees, namely commercial airlines operating airborne doppler radar equipment at 8800 MHz. In order to protect these licensed operations, the Commission -- without providing for public notice and comment -- made available the 13000 MHz band as replacement spectrum for the displaced licensees. To avoid any disruption in service, the Commission also expressly considered whether there would be equipment available for displaced licensees compatible with the 13000 MHz destination band. The Commission noted that "the regular licensing of dopplers at 8800 [MHz] will continue until the Commission finds the state of the art permits the transition to the 13000 [MHz] band and until such time as the Commission finds equipment can be made available in that band."[27]

In rejecting arguments that the Commission should have opened a rulemaking proceeding or otherwise held a hearing in advance of the reallocation, the *Bendix* court held

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[26] *See January 7, 1997 NTIA Letter* at 2; *DEMS Relocation Order* at 3478. WebCel attempts to distort the holding in *Bendix* by asserting that it "was not an APA case." WebCel Petition at 12. To the contrary, the *Bendix* Court expressly acknowledged that the Commission justified its actions under both Section 154(j) of the Communications Act, 47 U.S.C. § 154(j), *and* the APA's national security exception. In fact, the appellants in *Bendix* specifically "attacked the Commission failure to comply with the public notice provisions [of the APA]." *Bendix*, 272 F.2d at 536.

[27] *Bendix,* 272 F.2d at 541 (citation omitted).

that it was "satisfied that the Commission, confronted by the demands of the Executive for exclusive use of the frequency in question, had thus undertaken to do whatever was reasonably open to it in the light of national defense needs."[28] The court reasoned that in light of "the necessity for meeting essential national defense requirements, we fail to see how the Commission had any other alternative."[29]

The Commission relocated DEMS to 24 GHz in *exactly* the same manner as it had relocated the radionavigation service to 13000 MHz in *Bendix*. In particular, when "confronted by the demands of the Executive" to relocate DEMS, the Commission has "undertaken to do whatever was reasonably open to it in the light of national defense needs." NTIA itself made available the 24 GHz spectrum as a destination for DEMS, requesting the Commission to "take such steps as may be necessary to license DEMS stations in this spectrum."[30] The Commission, faced with the "necessity for meeting essential national defense requirements" as it was in *Bendix*, had no alternative but to comply with NTIA's request and immediately relocate DEMS to another band, precisely as it did with the doppler radionavigation service in *Bendix*. The Commission was obligated to defer to NTIA in invoking the national security exception, thus its decision to relocate DEMS was reasonable and inextricably linked to national security. Accordingly, the Commission's reasonable accommodation of military requirements in relocating the DEMS service and incumbent licensees is entitled to the same deference shown by the *Bendix* court.

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28 *Id.* at 542.

29 *Id.*

30 *January 7, 1997 NTIA Letter* at 2.

Likewise, the holding in *Bendix* directly refutes DIRECTV's contention that the DEMS relocation conflicts with the international 24 GHz allocation for broadcast satellite service ("BSS") operations. Bendix Aviation Corp. had argued that the radionavigation reallocation conflicted with an international allocation, which designated the evacuated band for radionavigation use. In dismissing this argument, the *Bendix* Court affirmed that it is the sovereign right of every country to regulate domestic spectrum use, particularly where a conflict between domestic and international spectrum allocation is attributed to "a vital national defense need."[31] Thus, it is irrelevant that the Commission's DEMS relocation may produce a conflict with the international allocation table since the relocation's objective is to preserve national security.[32]

Therefore, DIRECTV cannot bootstrap its case for reconsideration on its argument that it is entitled to a U.S. allocation for fixed satellite service ("FSS") uplinks in the 24.75-25.25 GHz band.[33] Indeed, even in cases where the U.S. itself has proposed an international allocation, such as the 2 GHz mobile satellite service allocation, the U.S. has determined that the national interest is not served by a corresponding domestic allocation.[34]

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31 *Id.*

32 There are numerous examples where a Commission allocation does not correspond to the international allocation for a particular frequency band, including the following: (1) 3600-3700 MHz (government radiolocation); (2) 2310-2360 MHz (BSS/WCS); (3) 902-928 MHz (government radiolocation and radionavigation); (4) 894-896 MHz (aeronautical mobile); and (5) 420-450 MHz (government radiolocation).

33 DIRECTV Petition at 10.

34 *See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4995 (1994) (deciding to "allocate to PCS a portion of the spectrum internationally designated for

(continued...)

In the instant case, at WARC-92, the U.S. did not propose an allocation for FSS uplinks in the 24.75-25.25 GHz band, but rather proposed an allocation for BSS downlinks at 24.65-25.25 GHz. Although the Commission did not object to an international allocation for possible FSS uplinks at 24.75-25.25 GHz for pairing with the BSS allocation, it did not adopt such an allocation into the U.S. Table of Allocations.[35] No party, including DIRECTV, initiated the allocation process in the U.S. prior to DEMS relocation.[36]

Not only does *Bendix* demonstrate that the Commission acted entirely properly in this case, the precedent relied on by Petitioners, *Independent Guard Ass'n of Nevada v. O'Leary* ("*O'Leary*"),[37] is plainly inapposite. In *O'Leary*, the Department of Energy ("DoE") invoked the APA national security exception in promulgating personnel management

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[34](...continued)
MSS [in order to] . . . provide maximum benefits to U.S. consumers"); *see also Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service* ("WCS"), *Report and Order,* 6 Comm. Reg. (P&F) 771, ¶ 28 (1997) (after the United States pursued (and obtained) an allocation for satellite digital audio radio service at 2310-2360 MHz at WARC-92, the Commission allocated 25 MHz of the band for WCS because of concerns about the feasibility of sharing with aeronautical radionavigation systems in Canada).

[35] *See* Footnotes S5.517 and S5.535 of the International Radio Regulations (Geneva, 1996).

[36] Moreover, the national security concerns giving rise to the relocation and the necessity to provide for comparable DEMS replacement spectrum preclude the Commission from reopening the book on DEMS relocation. Thus, even if the Commission were to consider addressing DIRECTV's proposal for a 24 GHz BSS allocation in the U.S., that would not warrant reconsideration of the DEMS relocation to 24 GHz. Rather, the Commission could address in a separate proceeding whether a BSS allocation is needed to serve the public interest, as well as whether such an allocation would be consistent with the 24 GHz DEMS allocation.

[37] 57 F.3d 766 (9th Cir. 1995). *See* WebCel Petition at 12 n. 31; MWCA Petition at 8; BellSouth Petition at 9.

requirements applicable to *non-military* independent contractors without public notice and comment. DoE failed to identify *any* military function performed by the contractors' civilian employees or other national security considerations underlying its decision and it cited no military request necessitating its action. As a result, the Court held that DoE's promulgation of personnel policies for civilian guards lacked any nexus to a military function and that DoE had not properly invoked the national security exception.

The instant case is unlike *O'Leary*. Here, there is a clear and unchallenged military function -- use of the 18 GHz spectrum for military satellite communications. Rather than making a unilateral national security judgment as a civilian agency, as DoE did in *O'Leary,* the Commission relocated DEMS from the 18 GHz band to the 24 GHz band at the *explicit request of NTIA,* which was acting on behalf of the Department of Defense. Unlike DoE's civilian subcontractor personnel policy in *O'Leary,* the Commission's DEMS relocation would not have been required *but for* NTIA's request that the Commission relocate DEMS from the 18 GHz band for national security purposes. Moreover, unlike the independent subcontractors in *O'Leary*, who were directly harmed by DoE's failure to solicit their views in promulgating personnel policies affecting them, the instant Petitioners are not harmed by the DEMS relocation and therefore have no similar interest to dispute the *DEMS Relocation Order*. The Petitioners do not hold licenses in the 18 GHz or 24 GHz bands and, in contrast to the petitioners in *O'Leary*, are in no way affected by the DEMS relocation.[38] Thus, *O'Leary* does not in any way alter the applicability of *Bendix*.

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[38] *See infra* Part III.

C. The APA National Security Exception Justifies the Relocation of DEMS Licensees on a Nationwide Basis

The Commission reasonably concluded that leaving a majority of DEMS licensees at 18 GHz would be unworkable. Although the January 7, 1997 NTIA letter referenced earth stations in Washington and Denver only, it stated categorically that band-sharing between the Government's military satellite systems and DEMS licensees "will not be possible" within 40 km of any Government earth stations, regardless of geographic location.[39] Indeed, in a subsequent letter NTIA confirmed that "both existing *and anticipated* FCC licensees could cause interference problems to the Federal Government use of the [18 GHz] band."[40]

Likewise, the Commission reasonably deemed relocation of all full power DEMS licensees necessary to "ensure the Government's current *and future* ability to operate military space systems in the 18 GHz frequency band," particularly given the reasonable likelihood that the Government may plan to utilize 18 GHz satellite services in other parts of the country.[41] Absent a nationwide relocation, the Commission would be forced to relocate DEMS licensees from the 18 GHz band on an "as needed" basis. Not only would such a piecemeal procedure signal the location of each newly installed secret military satellite facility with each new DEMS 18 GHz "carve-out," a result clearly adverse to national security interests, it also would create an ever-changing patchwork of DEMS band allocation which would disserve both the public and DEMS licensees.

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39 *January 7, 1997 NTIA Letter* at 2.

40 *March 5, 1997 NTIA Letter* at 1.

41 *DEMS Relocation Order* at 3478 (emphasis added).

More important, such a limited response by the Commission would have rebuked NTIA's explicit request that the Commission clear the 18 GHz band of full power DEMS licensees. The Government satellite system is classified; its technical and operational details are not publicly known. Based on information the U.S. provided to the International Telecommunications Union in 1995,[42] it appears the system comprises both geostationary and non-geostationary satellites, which would make it unlike any commercial system. No one, including the DEMS licensees and the Petitioners, is qualified to second-guess NTIA's (or the Defense Department's) risk assessment that such a comprehensive DEMS reallocation was needed.

Nevertheless, certain Petitioners purport to know better and challenge the Commission's determination by claiming that relocating only the Washington and Denver DEMS operations could have resolved the core national security conflict.[43] As demonstrated immediately above, this is not the case. Further, in addition to national security concerns, the Commission reasoned that, although the Washington and Denver regions are important multi-city commercial centers meriting local competition, they do not comprise an economy of scale large enough to justify the prohibitive costs inherent in equipment manufacturers producing DEMS equipment custom-designed for customers only in these areas. Thus, a bifurcated DEMS allocation, split between the 24 GHz band in the Washington and Denver

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42 *See* AP3 and AP4, Information Filed by United States Government for Satellite Networks USCSID A1-A6, E1-E4, W1-W2, and P.

43 *See, e.g.,* DIRECTV Petition at 15-16; MWCA Petition at 9-10.

regions and 18 GHz everywhere else, would likely result in manufacturers designing and marketing equipment that is compatible only for 18 GHz operations.

In effect, Petitioners propose an unnecessarily restrictive application of the national security exception that would deprive consumers in at least two metropolitan regions[44] of the competitive and technological benefits associated with DEMS services. Such a result would undermine the specific mandate of the 1996 Act and unnecessarily deprive users in these markets from choosing among competitive telephone providers. It also would effectively revoke the DEMS licenses in the carved-out areas, even though licensees there have fully complied with all applicable Commission rules and have invested significant financial resources in designing, constructing and operating their DEMS systems.

Moreover, there is no basis to the Petitioners' contention that the Commission and NTIA were wrong to consider the importance of preserving the nationwide viability of DEMS.[45] As evidenced by *Bendix*, nothing in the APA precludes the Government from taking into consideration the operational or competitive sensitivities of affected entities in applying the national security exception, specifically including equipment availability.

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44 NTIA indicated that the military earth stations in question in Washington, DC and Denver could not share with DEMS licensees located within 40 kilometers of those earth stations. *See January 7, 1997 NTIA Letter* at 2; *DEMS Relocation Order* at 3472-73. This vicinity includes not only the Washington and Denver SMSAs, but also the Baltimore, Maryland and Richmond, Virginia SMSAs.

45 *See, e.g.*, DIRECTV Petition at 15-16; MWCA Petition at 8. In preserving a nationwide DEMS allocation, the Commission expressly maintained its longstanding policy that the DEMS allocation should be equally available throughout the U.S. *DEMS Relocation Order* at 3475 n.15 (*citing Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules to Allocated Spectrum at 18 GHz*, 54 R.R.2d (P&F) 1091 (1983)).

Accordingly, the Commission reasonably addressed national security concerns in a manner that preserves the competitive viability of DEMS, protects the interests of both DEMS licensees and customers, and avoids adversely affecting any existing licensees or other entities that might have had a vested interest in the relocation or the 24 GHz band. Again, as the court noted in *Bendix*, "the Commission, confronted by the demands of the Executive for exclusive use of the frequency in question, [undertook] to do whatever was reasonably open to it in light of national defense needs."[46]

Finally, some Petitioners make the untenable assertion that Teledesic's agreement to reimburse DEMS licensees for certain relocation expenses somehow undermines the *DEMS Relocation Order*.[47] The Commission acknowledged correctly, however, that because "Teledesic has a separate interest in relocating DEMS from the 18 GHz band" it has "agreed to reimburse licensees which are required to modify existing equipment in order to operate in the 24 GHz band."[48] In short, Teledesic is merely an incidental beneficiary of the DEMS relocation and agreed to reimburse a small portion of the DEMS Licensees' relocation costs to facilitate the relocation.

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46 *Bendix*, 272 F.2d at 542.

47 *See, e.g.*, DIRECTV Petition at 20. Similarly, BellSouth mischaracterizes the Commission's reference in the *DEMS Relocation Order* to the DEMS relocation being "consensual [in] nature" as supporting its contention that DEMS relocation was merely a mechanism to resolve the dispute between DEMS licensees and Teledesic regarding shared use of the 18 GHz band. BellSouth Petition at 15. The plain meaning of the Commission's statement, however, is that incumbent licensees were not expected to and in fact did not oppose relocation to 24 GHz.

48 *DEMS Relocation Order* at 3474-75.

D. The Commission Did Not Rely on the APA's Good Cause Exception as an Independent Basis for Relocating DEMS Without Public Notice and Comment

The Petitioners also mistakenly contend that the Commission applied the APA's "good cause" exception separate and apart from the national security exception.[49] On the contrary, the Commission did not rely on the APA's good cause exception as an independent basis for dispensing with public notice and comment. Indeed, as demonstrated in the preceding section, the good cause exception is unnecessary to justify any aspect of the DEMS relocation. Once the Commission is within the scope of the national security exception, *Bendix* confirms that the agency can take any reasonably related steps to accommodate national security concerns without utilizing public notice and comment. The Commission's reference to the existence of "good cause shown" to dispense with public notice and comment[50] is merely a reference to the underlying national security justification for the

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[49] DIRECTV Petition at 22; MWCA Petition at 13; BellSouth Petition at 10. The APA provides that notice and comment are unnecessary "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Congress defined these criteria as follows:

> "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public were not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rulemaking procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.

[50] *DEMS Relocation Order* at 3478.

DEMS relocation. Thus, the Commission's citation to the APA's good cause exception in the *DEMS Relocation Order* is consistent with the Commission's practice of recognizing the inextricable nexus between the "good cause" and national security exceptions.[51]

III. The Petitioners Lack Standing To Challenge The Commission's Lawful Exercise Of Its Authority

The only non-governmental licensees affected by the DEMS relocation are the DEMS operators themselves, and these operators expressed no opposition to the relocation.[52] Petitioners cannot demonstrate any injury from the lack of public notice and comment, since they currently hold no Commission 18 GHz band or 24 GHz band authorizations. In *SunCom Mobile & Data, Inc. v. FCC*, for example, the D.C. Circuit found that a petitioner lacked standing to challenge a Commission action affecting a band in which the petitioner held no licenses.[53] SunCom, the petitioner, had requested the Commission to issue a declaratory ruling that its proposed wide-area, multiple-station 220 MHz network complied with certain Commission rules. When the Commission refused to issue the requested ruling,

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51 *See, e.g.*, Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for the Fixed-Satellite Service in the 17.8-20.2 GHz Band for Government Use, *Memorandum Opinion and Order*, 10 FCC Rcd 9931, 9932 (1995).

52 *DEMS Relocation Order* at 3476 n. 20 and 3478. The Commission employed Section 316 license modification proceedings for all affected 18 GHz DEMS licensees, providing each licensee with notice and an opportunity to comment on the proposed modification of its 18 GHz license. *DEMS Modification Order* at ¶ 4 (noting that there are no protests to the license modifications). As the Commission correctly noted, "[t]he only current operations in the United States in the 24 GHz band are two radionavigation radar facilities operated by the FAA," which are "scheduled to be decommissioned as of January 1, 1998 and January 1, 2000, respectively." *DEMS Relocation Order* at 3477.

53 *SunCom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386, 1388 (D.C. Cir. 1996) ("*SunCom*").

SunCom argued that the Commission's refusal had "impeded its proposal" for a wide-area 220 MHz system.[54]

The court held that SunCom lacked standing to challenge the Commission's action given that SunCom's lack of licenses rendered it incapable of demonstrating "personal injury-in-fact that is . . . 'fairly traceable' to the [Commission's] conduct" and "redressable by the relief requested."[55] The court held that SunCom's allegations "fail to show . . . 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'"[56] The court relied on well-settled precedent that a claimant has standing only if there is "a causal connection between the injury and the conduct complained of -- the injury has to be fairly trace[able] to the challenged action of the defendant."[57]

To the extent that none of the Petitioners hold licenses to show a legitimate injury-in-fact, Petitioners are identical to the petitioner in *SunCom.* Like SunCom, they lack standing to challenge the Commission's *DEMS Relocation Order* because they lack any authorizations susceptible to injury as a result of the Commission's action.[58] Also as in

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54 *Id.* at 1387.

55 *Id.* at 1387 (*citing Brandon v. FCC,* 993 F.2d 906, 908 (D.C. Cir. 1992)).

56 *Id.* at 1388 (*citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal citations omitted) ("*Lujan*")).

57 *Lujan*, 504 U.S. at 560-61 (internal citations omitted); *see also Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) ("The party who invokes the power [of judicial review] must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury. . . . Here the parties have no such case.").

58 *Id.*